

REMARKS

The amendment does not involve new matter. Claims 34 and 35 are directed to a product and call for features found in claims 26 and 31.

Claims 6, 11, 24-27, 30 and 31 were rejected in the outstanding Office Action under 35 U.S.C. §103(a) as unpatentable over U. S. Patent No. 5,480,668 (Nofre '668) in view of U.S. Patent No. 4,997,659 (Yatka). This rejection is respectfully traversed.

Claims 6, 11, 24-27, 30 and 31 were rejected in the outstanding Office Action under 35 U.S.C. §103(a) as unpatentable over U. S. Patent No. 5,510,508 (referred to on the face of the patent as Claude et al., but referred to in the Office Action as Nofre et al. 5,510,508, and referred to herein as Nofre '508) or Nofre '668 in view of U.S. Patent No. 4,374,858 (Glass) and Yatka. This rejection is also respectfully traversed.

The reasons why the rejections are traversed are provided in the Appeal Brief and Reply Brief previously filed in this case. The outstanding Office Action repeats arguments from the Examiner's Answer, which were addressed in the Reply Brief. The only new arguments have to do with the attachments to the Appeal Brief that have now been entered into evidence. The Office Action asserts that FDA approval has no bearing on patentability. In their Appeal Brief, Applicants pointed out that the rejections are based on the position that alitame is a well known sweetener, and the ways alitame are used in Yatka would make it obvious to apply the teachings of Yatka to "other conventional chewing gum sweeteners." In reply Applicants noted that at the time of the present invention, neotame could not be considered to be a conventional chewing gum sweetener. While its use in chewing gum is suggested by Nofre '508, that does not make it a conventional sweetener. Neotame was not even approved for use as a sweetener in food in the U.S until July, 2002, which was well after the 1998 effective filing date for the present application. This lack of FDA approval precludes a determination that neotame was a conventional sweetener at the time of the invention. Thus, in this instance, the lack of FDA approval refutes a position in the Office Action and does have bearing on patentability.

Applicants are filing herewith a Declaration Under 37 C.F.R. § 1.132 of David G. Barkalow, which sets forth unexpected results of the invention, further rebutting the rejections.

Claims 11, 26-27 and 31 require using an N-substituted derivative of aspartame as part of a coating formed by panning a chewing gum pellet. It has been discovered that neotame, an N-substituted derivative of aspartame, having the chemical formula specified in claim 31, produced unexpected results with respect to inhibiting bitterness when used in a chewing gum coating according to the method of claims 26-27 and 31. See paragraphs 8 and 9 of the Declaration of David G. Barkalow, submitted herewith. This evidence of unexpected results rebuts any *prima facie* case of obviousness that may have been made out by the prior art relied on in the outstanding Office Action.

The tests that are described in the Barkalow Declaration compare gum products made with coatings containing neotame to gum products made with a coating containing aspartame. It is recognized that the Yatka reference discloses coatings made with alitame. Applicants attempted to obtain some alitame so that comparative tests could also be run to compare alitame to neotame. However, the supplier from whom alitame was previously obtained no longer makes alitame, and no other source of supply in the United States could be found. Robert J. Yatka, one of the inventors, is very familiar with alitame. His recollection is that alitame has sweetness properties similar to aspartame, and he expects that alitame would have produced similar bitterness results as were found with the samples made using aspartame discussed in the Barkalow Declaration. Thus, it is believed that the unexpected reduction of bitterness that was found for coatings containing neotame compared to coatings containing aspartame would have also been found if alitame and neotame containing coatings were compared.

Since each of the reasons for the rejections have been overcome, it is believed that the case is in condition for allowance.

Respectfully submitted,

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